89-1979

No. _____

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In the Supreme Court of the United States

October Term, 1989

BOARD OF TRUSTEES OF THE UNIVERSITY OF KENTUCKY and DEAN JOHN B. STEPHENSON .. CROSS-PETITIONERS

versus

DR. JOSEPH MURRAY HAYSE .. CROSS-RESPONDENT

CROSS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTIONS PRESENTED FOR REVIEW

1. Can a state's traditional common law sovereign immunity, which would otherwise completely bar U.S.C. §1983 suits or direct constitutional claims against the state in its own courts be waived or lost through procedural default during litigation?

2. Since Kentucky has not formally waived its traditional common law sovereign immunity from 42 U.S.C. §1983 or direct constitutional claims, did the Supreme Court of Kentucky err in ruling that prospective injunctive relief is authorized against the state itself?

3. If a state official acts within the scope of his employment, can he be personally liable for monetary damages to a plaintiff who prevails in a 42 U.S.C. §1983 suit against him?

4. If 42 U.S.C. §1983 claims are defectively plead initially as direct constitutional claims, is the statute of limitations for 42 U.S.C. §1983 claims nevertheless tolled by the initial defective pleading?

5. In holding that the limitations period for 42 U.S.C. §1983 does not begin to run at the time of a university professor's terminal reappointment, did the Supreme Court of Kentucky misinterpret *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980)?

PARTIES

The parties below were Dr. Joseph Murray Hayse, the Board of Trustees of the University of Kentucky and Dean John B. Stephenson.

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OPINIONS BELOW

The Opinion of the Supreme Court of Kentucky is reported at 782 S.W.2d 609 (1989) and is reproduced in the Appendix to Docket No. 89-1741.

The Opinion of the Kentucky Court of Appeals rendered December 11, 1989, modified April 1, 1989 is unreported and is reproduced in the Appendix to Docket No. 89-1741.

The Opinion of the Kentucky Court of Appeals rendered February 26, 1982 is unreported and is reproduced in the Appendix to Docket No. 89-1741.

The Opinions of the Franklin Circuit Court, dated May 27, 1981; March 19, 1986; and July 3, 1986, respectively, are unreported and are reproduced in the Appendix to Docket No. 88-1741.

JURISDICTION

The Supreme Court of Kentucky, a state court of last resort, has rendered a published decision in this case regarding the rights of a petitioner under 42 U.S.C. §1983. This decision conflicts with the decisions of other state courts of last resort, of federal Courts of Appeals, and of this Court.

The Supreme Court of Kentucky issued its Opinion in this case on November 9, 1989. Its Order Denying the Parties' Petitions For Rehearing was entered February 8, 1990. Dr. Joseph Murray Hayse filed a Petition For Writ of Certiorari to the Kentucky Supreme Court on May 8, 1990, within ninety days after the entry of the Order Denying the parties' Petitions For Rehearing. This Cross-Petition is filed pursuant to United States Supreme Court Rule 12.3, within thirty days after receipt of Dr. Hayse's petition on May 8, 1990.

This Court has jurisdiction to review the Opinion of the Supreme Court of Kentucky, pursuant to 28 U.S.C. §1257.

FEDERAL STATUTE

This case involves 42 U.S.C. §1983 which states:

> Every person who, under color of any statute, ordinance, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATE CONSTITUTIONAL PROVISION

KENTUCKY CONSTITUTION SECTION 231

The General Assembly may, by law, direct in what manner and in what court suits may be brought against the Commonwealth.

STATE STATUTES

This case also touches upon KRS 164.225 and KRS 413.140(1)(a), which state, respectively, as follows:

KRS 164.225

Anything in any statutes of the Commonwealth to the contrary notwithstanding, the power over and control of appointments, qualifications, salaries and compensation, payable out of the state treasury or otherwise, promotions and official relations of all employees of the University of Kentucky as provided in KRS 164.220, and, subject to any restrictions

STATE STATUTES (Continued)

KRS 164.225 (Continued)

imposed by general law, the retirement ages and benefits of such employees shall be under the exclusive jurisdiction of the Board of Trustees of the University of Kentucky which shall be an independent agency and instrumentality of the Commonwealth.

KRS 413.140(1)(a)

The following actions shall be commenced within one (1) year after the cause of action accrued: (a) an action for an injury to the person of the plaintiff or of his wife, child, ward, apprentice or servant.

has never personally reviewed the files of faculty members not recommended for tenure, and does not do so now. According to the University's governing regulations:

> The dean . . . shall be responsible for . . . terminal appointments . . . or for ultimate action thereon when such authority has been delegated by the vice-president to whom the dean reports or by the president.

At trial, testimony was uncontroverted that the university's president had long ago delegated to the deans the authority to hire and terminate non-tenured professors. If a dean recommends against tenure a candidate's file is considered no further. Following this procedure, Dr. Evans sent Hayse's file to Dean Stephenson in 1977, recommending tenure. Dean Stephenson disapproved the recommendation. Hayse accepted a one-year terminal reappointment in February, 1977. According to the minutes of the University's Board of Trustees, the Board of Trustees ratified Hayse's terminal reappointment on May 3, 1977. In addition to Hayse, fourteen other faculty members received terminal reappointments for the 1977-78 academic year, as recommended by the president and ratified by the Board without discussion and without review of the candidates' files.

In February, 1978 Hayse appealed his terminal reappointment. Dean Stephenson voluntarily appointed a three person *ad hoc* committee to assist him in considering Hayse's situation. Dr. Lewis Swift,

Professor of Classical Languages at the University served on the *ad hoc* committee. He recalled at trial that after he and his fellow committee members had reviewed Hayse's file they recommended against tenure because of Hayse's poor publication record, which did not inspire confidence in his future performance as a scholar.

Hayse continued to protest. Dean Stephenson, bending regulations, agreed to forward Hayse's file to Vice-President Cochran and to an area advisory committee for review. Ultimately, all of those persons recommended against tenure. Of the fifteen professors who reviewed Hayse's file, fourteen concluded that he did not merit tenure, primarily because he had not published scholarly works. Dr. Evans, the departmental chairman, was Hayse's sole supporter.

In March, 1979 Hayse sued the University and Dean Stephenson, pleading breach of contract pursuant to a Kentucky statute that specifically allows state employees to bring contract claims against the state. By March, 1981, all parties had moved for summary judgment on the contract claims. On May 18, 1981, Hayse filed his First Amended Complaint, in which he claimed that the University and Dean Stephenson had violated his rights under the First, Fifth and Fourteenth Amendments of the United States Constitution. Specifically, he claimed that he was denied tenure because of an alleged feud between Dean Stephenson and Dr. Evans about how the honors

program should be run. On May 27, 1981 the Circuit Court granted the University's Motion For Summary Judgment on Hayse's contract claim, none of the parties having moved for summary judgment on the constitutional claims. Hayse appealed. The Court of Appeals reversed the summary judgment but failed entirely to address the contract claim upon which it was based, instead remanding the case for findings of fact on the constitutional issues. No §1983 issues were addressed on the first appeal, since Hayse never mentioned §1983 until four years later, in 1985.

On March 18, 1985 Hayse filed a Second Amended Complaint in which he expressly replead his constitutional claims, then added §1983 claims. The University and Dean Stephenson asserted in their answer that Hayse's §1983 claims were time-barred, and that they were barred by sovereign immunity.

Hayse's constitutional and federal statutory claims were tried before a jury in March, 1986. The contract claim was not tried at that time, because the Kentucky statute that enables such claims to be brought precludes jury trials of such claims. The jury awarded Hayse $61,760.00 in damages. The trial court initially improved upon this verdict by entering an order promoting Hayse to the tenured position he originally sought. On June 3, 1986 the trial court entered a final order dismissing Hayse's constitutional and federal statutory claims as time-barred, sustaining the defendant's motion for judgment not withstanding verdict

because the evidence had failed to support any finding that impermissible factors motivated the University to deny Hayse's tenure application while the unrebutted proof showed that Hayse would not have gotten tenure anyway, vacating its earlier order reinstating Hayse with tenure, and conditionally sustaining the University's motion for a new trial.

Hayse appealed. In its December 11, 1987 Opinion the Kentucky Court of Appeals held that the trial court had improperly granted judgment notwithstanding verdict on the basis of insufficient evidence; that Hayse's §1983 claims were not time-barred; that reinstatement with tenure was an appropriate remedy; but that sovereign immunity shielded the University and Dean Stephenson from monetary damages.

In a 4 to 3 decision rendered November 9, 1989 the Supreme Court of Kentucky held that Hayse's constitutional and federal statutory claims were not time-barred; that the University and Dean Stephenson had waived sovereign immunity to Hayse's §1983 claims by failing to raise sovereign immunity as an issue during the 1981 appeal of the trial court's summary judgment on Hayse's contract claim;[1] that even if the sovereign immunity defense had not been foreclosed by

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[1]The court arrived at this result even though the University raised sovereign immunity as a defense to every complaint Hayse filed, including the Second Amended Complaint filed in 1985, four years *after* the first appeal, in which Hayse first asserted his §1983 claims.

the first appeal, it did not apply to Dean Stephenson because his wrongdoing had been personal rather than official; and that while Hayse was not entitled to automatic reinstatement with tenure, he was entitled to have his application for tenure considered anew by the Board of Trustees itself. Three members of the Court, in strong dissent, reasoned that since Kentucky's sovereign immunity goes to subject matter jurisdiction, it cannot be waived or lost through procedural defect; that since Dean Stephenson was sued only in his official capacity, an award of monetary damages against him was improper; and that Hayse, who had gotten his Ph.D. four years late and published no scholarly works during his seven-year career at the University, would not have gotten tenure anyway.

The University and Dean Stephenson preserved the statute of limitations question for review by raising it as an affirmative defense to Hayse's §1983 claims when he plead them in 1985. The University and Dean Stephenson plead sovereign immunity in their Motion to Dismiss, which was their first responsive pleading in this case, and in their Answer. They reiterated this defense in both their answer to Hayse's amended complaint in 1981, in which he plead his constitutional claims for the first time, and in their Answer to his Amended Complaint in 1985, in which he plead his §1983 claims for the first time. Both defenses were raised again in briefs to both the Court of Appeals of Kentucky and the Supreme Court of Kentucky.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW THAT COMMON LAW SOVEREIGN IMMUNITY DOES NOT GO TO SUBJECT MATTER JURISDICTION RAISES IMPORTANT AND UNRESOLVED QUESTIONS.

This Court has never resolved the question of what effect §1983 has upon a state's immunity from suit in its own courts. However, this Court has often recognized that §1983 does not override the traditional common law immunities existing at the time of its adoption. *Imbler* v. *Pachtman,* 424 U.S. 409 (1976); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951). Even *Quern* v. *Jordan,* 440 U.S. 332 (1979) does not definitively settle the question of whether traditional sovereign immunity can be a complete bar to §1983 suits against a state in its own courts, since the *Quern* decision rested in part on a state's Eleventh Amendment immunity in federal court. Lower courts need this Court's guidance on this point.

Kentucky's posture with regard to §1983 suits is typical. Section 231 of the Kentucky Constitution gives the state absolute immunity from all suits except those to which the state, through an act of the General Assembly, has consented.[2] Section 231 says:

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[2]Kentucky's Constitution has always provided for the state's immunity against suits except as authorized by the General Assembly. The current provision in Kentucky's fourth Constitution is identical to the provision contained in Article VIII, Section 6 of Kentucky's third Constitution which was adopted on June 11, 1850. Thus, Kentucky's assertion of its traditional common law sovereign immunity had long been codified in its Constitution at the time §1983 was adopted in 1871.

> The General Assembly may, by law, direct in what manner and in what court suits may be brought against the Commonwealth.

In KRS 164.225, the General Assembly of Kentucky has decreed that the Board of Trustees of the University of Kentucky is "an independent agency and instrumentality of the commonwealth." Because the University's Board of Trustees is a statutorily created agency of the state it has the same immunity as the state. Until now, Kentucky's courts have consistently upheld this position. *Martin* v. *University of Louisville*, 541 F.2d 1171 (6th Cir. 1976); *Dunlap* v. *University of Kentucky*, 716 S.W.2d 219 (Ky. 1976); *Rooks* v. *University of Louisville*, 574 S.W.2d 923 (Ky. App. 1978); *University of Louisville* v. *Martin*, 574 S.W.2d 676 (Ky. App. 1978).

This Court has long recognized each state's right to exercise its traditional sovereign immunity against all causes of action. *Palmer* v. *Ohio*, 248 U.S. 32 (1918); *Hopkins* v. *Clemson College*, 221 U.S. 636 (1911). In *Quern* v. *Jordan*, 440 U.S. 332 (1979), this Court confirmed that in enacting 42 U.S.C. §1983. Congress did not intend to override the states' traditional common law sovereign immunity.[3]

Before its decision in this case, the Supreme Court of Kentucky had never directly considered whether traditional sovereign immunity bars §1983 suits

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[3]For purposes of immunities, direct constitutional claims are indistinguishable from those brought through Section 1983. *Butz* v. *Economou*, 438 U.S. 478 (1978).

against the state in its own courts. However, in *Fetterman* v. *University of Connecticut*, 473 A.2d 1176 (Conn. 1984), *Kapil* v. *Association of Pennsylvania State College and University Faculties*, 448 A.2d 717 (Pa. 1982), and *Kristensen* v. *Strinden*, 343 N.W.2d 67 (N.D. 1983), the highest courts of Connecticut, Pennsylvania, and North Dakota, respectively, determined that those states' traditional sovereign immunity protected them from §1983 actions brought in their own courts.[4] The *Kristensen* court pointed out that since no §1983 claims may be brought against a state in federal court because of Eleventh Amendment immunity, then none ought to be brought in state court either. The court reasoned that to hold otherwise would be to condone forum shopping, because a plaintiff could force a state court to entertain federal statutory claims against the state that the federal courts themselves would not entertain.

In this case, the Supreme Court of Kentucky skirted the entire problem of sovereign immunity, basing its decision upon the erroneous premise that the University and Dean Stephenson had waived sovereign immunity as a defense by not raising it during the 1981

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[4]The Supreme Court of Pennsylvania later reversed the *Kapil* decision, not because the lower court's reasoning was wrong, but because the cause of action had arisen after Pennsylvania's courts had abrogated the doctrine of sovereign immunity, but before the Pennsylvania legislature had reinstated it. *See, Kapil* v. *Association of Pennsylvania State Colleges*, 470 A.2d 482 (Pa. 1983). Section 231 of the Kentucky Constitution makes decisions regarding the state's sovereign immunity the exclusive province of the legislature.

appeal of the trial court's summary judgment on Hayse's contract claim. This premise cannot be correct, since sovereign immunity is not merely a limitation upon the remedies which may be awarded against a state, but rather, is a limitation upon the very suit itself. Sovereign immunity presents the court with an "all or nothing" proposition. If a defendant has sovereign immunity then there can be no suit because the courts are without jurisdiction to hear it. Because sovereign immunity goes to subject matter jurisdiction, it can never be waived by the acts or omissions of the parties during litigation. Almost every court in this country has at one time accepted and articulated the proposition that sovereign immunity, as a jurisdictional defense, may be raised at any time, even on appeal, and even by the Supreme Court itself. *E.g.*, *Edelman* v. *Jordan*, 415 U.S. 651, 677-78 (1974); *Alabama* v. *Pugh*, 438 U.S. 781, 782 n.1 (1978); *Reeves* v. *International Telephone and Telegraph Corp.*, 616 F.2d 1342, 1339 n.8 (5th Cir. 1980); *Jakobsen* v. *Massachusetts Port Authority*, 520 F.2d 810, 813 n.3 (1st Cir. 1975); *Wells* v. *Commonwealth Department of Highways*, 384 S.W.2d 308 (Ky. 1974). The Supreme Court of Kentucky's decision, however, flies in the face of this rule and defies logic in doing so.

THE DECISION BELOW THAT PROSPECTIVE INJUNCTIVE RELIEF IN A §1983 CASE IS AVAILABLE AGAINST THE STATE ITSELF CONFLICTS WITH THE DECISIONS OF FEDERAL COURTS OF APPEALS.

In §1983 suits, prospective injunctive relief is available only against state officials in their official capacities. However, the "prospective injunctive relief" that the Supreme Court of Kentucky has awarded to Hayse was not awarded against Dean Stephenson, much less against Dean Stephenson in his former official capacity, or against any other state official, but rather against the University itself. This is tantamount to awarding relief against the state itself.[5] In its decision, the Supreme Court of Kentucky orders the trial court to "enjoin the University of Kentucky Board of Trustees to consider Dr. Hayse's application as stated above, under the rules and regulations pertaining thereto at the time tenure was denied him."

That Dr. Hayse's 1977 application for tenure was treated in exactly the same way as that of every other similarly situated professor in the history of the University has never been disputed, Now, however, for Hayse alone, the University of Kentucky's Board of Trustees must personally consider Hayse's complete

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[5]Even if the Supreme Court of Kentucky had ordered such relief against former Dean Stephenson, Stephenson would be powerless to comply since he has been president of Berea College, a private institution, for several years and is no longer a state official. He therefore cannot possibly be engaged in any ongoing conduct that the courts can enjoin in this suit.

dossier. This will be an extraordinary event since the Board of Trustees does not personally review the dossier of anyone not recommended for tenure. It has never done so. The University's regulations have never required it to do so and do not require it to do so now. The remedy the Supreme Court of Kentucky has fashioned is not only improper under §1983, but requires the Board of Trustees to commit a procedural irregularity. To have the Board of Trustees review a candidate's actual file is ironic, too, since the Board members are administrators, not academicians. Like courts, they lack experience in making substantive evaluations of candidates for tenure.

Because the University is immune from all of Hayse's federal and statutory claims, it necessarily follows that the University is immune from any remedy that might be imposed upon the basis of those claims. The Supreme Court of Kentucky's directive regarding the University of Kentucky's Board of Trustees is therefore improper. Moreover, it requires the Board of Trustees to do something that has already been done. There is no record in the evidence of this case or anywhere else to show that in either 1977 or 1978 the University treated Hayse's application for tenure differently than it had ever treated anyone else's, except that in 1978 Dean Stephenson voluntarily asked for advice from his colleagues on this subject. Hayse presented no evidence to show that under the University's regulations President Singletary lacked the authority to delegate to the deans the responsibility for

hiring and terminating non-tenured faculty members. In fact the University's relevant governing regulation states that the president has such authority. Hayse presented no evidence to show that the file of any person not recommended for tenure has ever gone past the appropriate dean. He presented no evidence to show that the Board of Trustees ever reviews the files of non-tenured professors whose employment is about to be terminated. Moreover, Hayse's own counsel stipulated to the authenticity of the minutes for the May 20, 1977 meeting of the Board of Trustees which show that the Board ratified the Dean's recommendations of various faculty members for tenure and various others, including Hayse, for termination. In short, the parties had agreed that the Board of Trustees has already reviewed and rejected Hayse's application for tenure. The Board of Trustees may not be judicially required, pursuant to §1983, to review Hayse's application again.

In addition to creating an anomaly and a redundancy in the University's procedures the Supreme Court of Kentucky's decision conflicts with decisions of at least two United States Courts of Appeals. In *Kashani* v. *Purdue University*, 813 F.2d 843 (7th Cir. 1983), *cert. denied*, 484 U.S. 846 (1987) an Iranian student terminated from Purdue's doctoral program during the hostage crisis sued Purdue, its trustees, its president and various faculty members, seeking both monetary damages and reinstatement. The court in *Kashani* held that prospective injunctive relief was not available

against the university or against its Board of Trustees, but only against the university's officials in their official capacities.

Similarly, in *Lee* v. *Western Reserve Psychiatric Rehabilitation Center*, 747 F.2d 1062 (6th Cir. 1984) a discharged hospital employee sued for damages and reinstatement. The United States Court of Appeals for the Sixth Circuit affirmed the district court's dismissal of his Complaint for failure to state a proper claim under §1983. The court noted in dictum that the plaintiff's request to enjoin the defendants from adhering to their present discharge procedures in the future would theoretically have fallen within the narrow exception to the sovereign immunity doctrine only because the plaintiff had alleged that one of the defendants, a state official, was engaged in ongoing conduct that violated the constitution. The case at bar cannot possibly fall within this narrow exception to the sovereign immunity doctrine because it does not involve state officials engaging in ongoing conduct of any kind.

A STATE OFFICIAL ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT IS NOT PERSONALLY LIABLE FOR DAMAGES IN §1983 SUITS.

Hayse styled all of his complaints in this suit against *Dean* John B. Stephenson, never attempting to articulate a claim against Dean Stephenson other than in his official capacity. He neither plead nor attempted to prove that Dean Stephenson was acting

outside the scope of his duties and is therefore foreclosed from making that argument now. Even if Hayse had sued Dean Stephenson in both his official and his personal capacities, the Supreme Court of Kentucky's decision to award damages against Dean Stephenson would be erroneous. Damages may be awarded against a state official in his official capacity only if they would be available against the governmental entity for which that defendant is an executive. *Familias Unidas* v. *Briscoe,* 619 F.2d 391 (5th Cir. 1980); *See, Monell* v. *Department of Social Services For New York,* 436 U.S. 690 n.55 (1978). A private party is not personally liable for damages in a Section 1983 suit unless he is amenable to such a suit in his official capacity. *Parker* v. *Graves,* 479 F.2d 335 (5th Cir. 1973). Since no cause of action may be maintained against the University in this case, no suit for damages may be maintained against Dean Stephenson either. Moreover, a §1983 action cannot lie against a private person in his individual capacity, since a private person acting solely on his own behalf could not create the state action necessary for a §1983 suit.

THE SUPREME COURT OF KENTUCKY MISAPPLIED THE HOLDING OF *RICKS* CONCERNING THE STATUTE OF LIMITATIONS FOR HAYSE'S SECTION 1983 CLAIMS.

The parties agree and the Supreme Court of Kentucky correctly determined that in Kentucky a one-year statute of limitations applies for constitutional and federal statutory claims. *Wilson* v. *Garcia,* 471 U.S.

261 (1985); *Frisby* v. *Board of Education of Boyle County*, 707 S.W.2d 359 (Ky. App. 1986). *See*, KRS 413.140(1)(a). The Supreme Court of Kentucky also correctly concluded that the rule announced in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980) should control in this case. However, the Supreme Court of Kentucky then erred in its interpretation of *Ricks* by overlooking the crucial point of that decision: that the offer of a terminal reappointment contract to a non-tenured university professor starts the running of the statute of limitations for §1983 purposes.

Hayse received his terminal reappointment in February, 1977. He filed suit for breach of contract in March, 1979, amended his complaint to plead direct *Bivens*-style constitutional violations in 1981, and amended again to plead §1983 in 1985.[6] The Supreme

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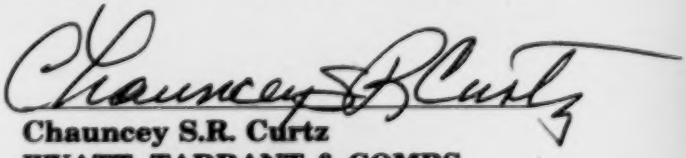
[6]When Hayse first brought suit in 1979, he based his complaint solely upon breach of contract. The running of the statute of limitations was not a legitimate defense to that claim. He plead his constitutional claims as direct *Bivens*-style claims in 1981, never mentioning §1983. In his briefs to the Supreme Court of Kentucky, he continued to insist that his direct constitutional claims were distinct from his §1983 claims. However, since §1983 provides the exclusive remedy for the kinds of constitutional claims Hayse raises, no direct action on those claims is permissible. *Thomas* v. *Shipka*, 818 F.2d 496 (6th Cir. 1987). His Amended Complaint in 1981 therefore failed to state a claim, as the University and Dean Stephenson correctly plead in their answer to the Amended Complaint. In 1985, six years after filing suit and four years after pleading his direct constitutional claims, Hayse plead §1983. The University and Dean Stephenson plead a statute of limitations defense. In point of fact, Hayse had plead no cognizable constitutional claims *until* 1985, by which time they were barred.

Court of Kentucky reasoned that because Hayse might have been rescued from termination had the University failed to confirm its original denial of tenure, the statute of limitations did not begin to run until the University made that confirmation in May, 1978. However, this directly contravenes *Ricks*. In *Ricks*, as in this case, the college took the official position that Ricks would not receive tenure but would be given a terminal reappointment. The offer of the terminal reappointment was the dispositive event. That the University had an internal method for reviewing its decision and that Hayse chose to make use of that method did not toll the running of the statute of limitations. To hold otherwise, as the Supreme Court of Kentucky did, is to create a "last day of employment rule," an approach that this Court expressly rejected in *Ricks*.

CONCLUSION

Because the decision of the Supreme Court of Kentucky regarding Hayse's rights under §1983 conflicts with the holdings of various state courts of last resort, of federal appellate courts, and of this Court, the University's cross-petition for Writ of Certiorari should be granted.



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NO. 89-1979

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

BOARD OF TRUSTEES OF THE
UNIVERSITY OF KENTUCKY and
DEAN JOHN B. STEPHENSON CROSS-PETITIONERS

v.

DR. JOSEPH MURRAY HAYSE CROSS-RESPONDENT

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

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Kentucky Constitutional Provision Involved

§ 231. Suits against the commonwealth. -- The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth.

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KRS 344.010

344.010. Definitions. -- In this chapter:

(1) "Person" includes one or more individuals, labor unions, joint apprenticeship committees, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, or other legal or commercial entity; the state, any of its political or civil subdivisions or agencies.

KRS 344.030

344.030. Definitions. -- For the purposes of KRS 344.030 to 344.110:

(1) "Employer" means a person who has eight (8) or more employes within the state in each of twenty (20) or more calendar weeks in the current or preceding calendar year and an agent of such a person.

KRS 344.450

344.450. Civil remedies for injunction and damages. -- Any person deeming himself injured by any act in violation of the provisions of this chapter shall have a civil cause of action in circuit court to enjoin further violations, and to recover the actual damages sustained by him, together with the costs of the law suit, including a reasonable fee for his attorney of record, all of which shall be in addition to any other remedies contained in this chapter.

KRS 413.120

413.120. Actions to be brought within five years. The following actions shall be commenced within five years after the cause of action accrues:

. . . .

(6) An action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated.

Objections to the Jurisdiction of the Court to Grant a Writ of Certiorari

Objection 1: On May 8, 1990, and within 90 days of the February 8, 1990 Order of the Kentucky Supreme Court denying a petition for rehearing, Cross-Respondent, Dr. Joseph Murray Hayse, docketed his Petition for Writ of Certiorari in *Dr. Joseph Murray Hayse v. Board of Trustees of the University of Kentucky*, No. 89-1741

On June 7, 1990, the Cross-Petition herein was docketed, and but for Rule 12.3 would have been untimely as having been filed more than 90 days after entry of the Kentucky Supreme Court's Order denying the petition for rehearing.

On June 28, 1990, the Petition of this Cross-Respondent in Case No. 89-1741 was denied. Contrary to Rule 15.5, this Cross-Respondent's Petition in Case No. 89-1741 was distributed to the Court before "the filing of a brief in opposition by the cross-respondent, the expiration of the time allowed therefor, or an express waiver of the right to file."

Rule 13.5[1], provides in part:

> . . . a cross-petition which, except for Rule 12.3, would be untimely, will not be granted unless a timely petition for a writ of certiorari of another party to the case is granted.

Except for Rule 12.3, the Cross-Petition herein would be

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[1] After Hayse's Petition in No. 89-1741 was denied on June 28, 1990, his counsel contacted the Clerk of this Court and learned that the quoted portion of Rule 13.5 meant what it said. Thus, Hayse by letter to the Clerk, dated July 2, 1990, waived his right to file a Brief in Opposition to the Cross-Petition herein. By letter from the Clerk dated August 29, 1990, at the direction of the Court, Hayse was requested to docket his Brief in Opposition to the Cross-Petition on or before September 28, 1990.

untimely.

Therefore, the jurisdiction of this Court to grant the Cross-Petition is dependent upon the viability of Cross-Respondent's Petition in Case No. 89-1741. Because the Petition is Case No. 89-1741 has been denied, this Cross-Petition may not be granted.

Objection 2: This Court is without jurisdiction to entertain the Cross-Petition of Dean John B. Stephenson. Cross-Petitioner, Stephenson was not a Respondent[2] to the Petition in Case No. 89-1741. Rule 12.3 provides, in pertinent part:

> Not more than 30 days after receipt of the petition for a writ of certiorari, counsel for a *respondent* wishing to file a cross-petition that would otherwise be untimely shall file . . . a cross-petition for a writ of certiorari . . . . (Emphasis supplied.)

Cross-Petitioner, Stephenson was not named a Respondent because he had no interest whatsoever in the outcome of the Petition. The Petition sought review of the refusal of the court below to grant the remedy of reinstatement of the Petitioner, a remedy which only the Respondent on that Petition, the Board of Trustees of the University of Kentucky would be empowered to carry out. Neither Cross-Respondent, Stephenson nor his

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[2] Pursuant to Rule 12.4, Hayse notified the Clerk of this Court in writing of Hayse's belief that Stephenson, a party below, had no interest in the outcome of the Petition, such notice being as follows:

> Petitioner hereby notifies the Clerk of this Court, pursuant to Rule 12.4. of this Court that it is the Petitioner's belief that Dean John B. Stephenson, a party to the proceeding in the court whose judgment is sought to be reviewed, has no interest in the outcome of the Petition.

A copy of such notice was served on May 8, 1990, as required by Rule 29, on all parties to the proceeding below.

successor would be involved in any respect in carrying out a reinstatement judgment. Stephenson was affected only by that portion of the Opinion below which directed the trial court to enter a damages judgment against him. Damages were not implicated in the Petition.

The Cross-Petition "would otherwise be untimely" but for the filing on the Petition in Case No. 89-1741. Because Cross-Petitioner, Stephenson, was not a Respondent on the Petition, this Court has no more jurisdiction to grant the Cross-Petition as to him than it would to grant a Petition filed by him more than 90 days after entry of the Final Order below.

Counterstatement Of The Case

The Cross-Petition[3] sets forth matters not pertinent to the questions presented, and not reviewable within the purview of the Cross-Petition.

Rule 14.1(g) mandates a *concise* statement of the case "containing the facts material to the consideration of the questions presented." The University presents five questions for review: two concern Kentucky's doctrine of sovereign immunity, one concerns personal liability of a state official (Stephenson) for damages, and two concern statute of limitations. Not until

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[3] Cross-Petitioners, Board of Trustees of the University of Kentucky (sometimes "the Board of Trustees") and Dean John B. Stephenson (sometimes "Stephenson") are sometimes collectively referred to as "the University." Stephenson was neither a named Respondent nor was he a necessary Respondent on Hayse's Petition. Because the Cross-Petition was filed more than 90 days after a petition could have been filed with respect to the Opinion below, Hayse contends that so much of the Cross-Petition as relates to Stephenson is not timely filed. Including Stephenson within the collective identification of "the University" is not to be construed as a concession otherwise.

the first full paragraph of page 4 (where the pleas of limitations and sovereign immunity are mentioned) does the Cross-Petition begin to conform with Rule 14.1(g.)

Virtually everything on the first two and one-half pages of the Cross-Petition is an outline by the University of its custom of following a procedure on tenure applications not authorized by University Regulations. Not only does that portion of the Cross-Petition recite (inaccurately) matters not material to consideration of the questions presented, it deals with a matter long ago concluded on Hayse's first appeal.

The Kentucky Court of Appeals, by its Opinion of February 26, 1982, held that the University's "practice ... (of) pass(ing) on for higher review (recommendations for promotions) only in the event they are approved by the dean of the college...is not the procedure established by the regulations which have been adopted and custom cannot be allowed to supersede the duly adopted procedures." (Pet.[4] 54a-55a.)

Hayse applied for promotion to the rank of Associate Professor, with tenure. The University quotes a portion of the Regulations on the authority of the Dean to effect terminal appointments. That authority is irrelevant to what authority the Dean had when applications for promotion to the rank of Associate Professor are being processed. Under the Regulations the Dean had authority to grant or deny promotions to the rank of *Assistant* Professor, a rank below that of Associate Professor. However, the Regulations limited the Dean's authority with respect to Associate Professor promotions, i.e., he was permitted only to subscribe his written comments, and was required to forward the application on through the upper levels of the

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[4] This is a reference to Hayse's Petition for Writ of Certiorari.

University for ultimate approval or disapproval by the Board of Trustees. The Kentucky Court of Appeals (twice) and the Kentucky Supreme Court have rejected the University's contention that when the Dean recommends against promotion and tenure to the rank of Associate Professor the matter is at an end.

At the top of page 3, the University sets out its view of its trial evidence. What the University showed in its failed attempt to convince the jury that Hayse's application for tenure and promotion would have been disapproved by the Board of Trustees, notwithstanding its violation of Hayse's 1st and 14th Amendment rights, is not material to a consideration of the questions presented.

At the top of page 4, the University, as it did in its Brief in Opposition to the Petition, misstates the procedural events prior to Hayse's first appeal. Hayse's grounds for summary judgment and opposition to the University's motion for summary judgment were that the University had violated his 1st and 14th Amendment rights. Hayse's constitutional arguments necessitated the filing of his first Amended Complaint (prior to the ruling on summary judgment) to plead his claims directly under the 1st and 14th Amendments, in order to conform his pleadings to those grounds. The summary judgment in favor of the University, entered prior to Hayse's first appeal, rejected Hayse's argument that the University had violated his 1st and 14th Amendment rights. In that May 27, 1981 summary judgment, the trial court ruled (See, Pet. 57a) that it

> Is of the opinion the actions taken by the defendants were in accordance with the Governing Regulations and the Administrative Regulations of the University and did not amount to a breach of contract. Nor did they violate any constitutional right of plaintiff.

As required by Rule 15.1, Hayse points out that by failing to cross-appeal the trial court's prior rejection of its sovereign immunity defense[5], when Hayse first appealed to the Court of Appeals from the May 27, 1981 summary judgment, the University was precluded from asserting on any subsequent appeal that sovereign immunity operated as a defense to Hayse's federal constitutional and §1983 claims. This is so under Kentucky's "law of the case" doctrine, as evidenced by the Opinion below. Nothing which as been said should be construed as a concession by Hayse that the University's first two questions (dealing with sovereign immunity) present federal questions.

This action was initially brought by Hayse under a state statute authorizing breach of contract actions against the University, among others. Thereafter, but before his first appeal to the Kentucky Court of Appeals, Hayse, relying on discovery, moved for summary judgment based on claims directly under the 1st and 14th Amendments. Because his original Complaint did not conform to his constitutional arguments on summary judgment, Hayse amended his Complaint to allege that the Board of Trustees and Stephenson had violated his 1st Amendment, Due Process and Equal Protection rights.

Thereafter, the trial court granted summary judgment to the Board of Trustees and Stephenson, deciding that "(the actions taken by the defendants did not) violate any constitutional right of plaintiff" nor "amount to a breach of contract." (Pet. 57a.) The first appeal ensued.

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[5] Under Kentucky law, interlocutory orders entered prior to judgment are incorporated into the final judgment for appeal purposes.

After reversal and remand on a holding by the Kentucky Court of Appeals that Hayse's rights under the Due Process and Equal Protection Clauses had been violated, but that Hayse's 1st Amendment claim presented issues of fact triable under *Mt. Healthy City School Board of Ed. v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977) (Pet. 52a-56a), Hayse filed his Second Amended Complaint. The Second Amended Complaint reaffirmed the allegations of his Complaint, as amended, (thereby reasserting his claims directly under the federal Constitution) and asserted those identical claims under §1983. Kentucky's Civil Rule 15.03(1) has a feature like its federal counterpart which relates amended complaints back to the date of the filing of the original complaint.

Not until it filed its brief in the Kentucky Supreme Court did the University concern itself with the fact that Hayse's federal constitutional and §1983 claims had been pursued simultaneously, and then only obliquely, as a part of an *argument* concerning the effect of waiver and the "law of the case" doctrine on limitations.

Rule 12.3 provides that a cross-petition for writ of certiorari shall comply in all respects with Rule 14. Rule 14.1(h) specifies in detail what must be specified in the statement of the case to show that "the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari."

The Statement of the Case notes that sovereign immunity was pled in the motion to dismiss and the Answer. However, absent from the Statement is any subsequent reference to the University's "method or manner of raising" the question of sovereign immunity, as well as "the way in which (the question was) passed upon by" the court of first instance and the appellate courts. By way of footnote 1 of the Cross-Petition, the

University notes that its Answers to the Complaint and Amended Complaints "raised" the defense of sovereign immunity. Of course, Rule 14.1(h) seeks specificity as to timeliness and propriety of raising the "federal" question sought to be reviewed. Merely pleading a defense is not comparable to raising it by motion for a decision on the merits of that defense. By operation of Kentucky's law of the case doctrine and the "relation-back" feature of Kentucky's Civil Rule 15.03(1), pleading sovereign immunity on remand after the first appeal was too late.

At page 5-6, the University mischaracterizes the Opinion below as holding

> . . . that even if the sovereign immunity defense had not been foreclosed by the first appeal, it did not apply to Dean Stephenson because his wrongdoing had been personal rather than official . . . .

Stephenson's liability, according to the Opinion below, rested on the fact that he was *sued* individually, the instructions[6] identified him as a separate defendant subject to an award of damages against him personally, and the fact that his wrongdoing occurred while serving in his official capacity did not entitle him to the defense of sovereign immunity.

How the Board of Trustees challenged the trial court's judgment reinstating Hayse was not provided. The basis for the trial court's ruling that Hayse's claims were time-barred is not provided. The University never pled the defense of limitations to Hayse's Amended Complaint (filed prior to the first appeal to the Court of Appeals) wherein Hayse asserted his claims directly under the 1st and 14th Amendments. The trial court's

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[6] Neither the Board of Trustees nor Stephenson challenged any jury instruction on appeal.

ruling on the question of Stephenson's personal liability for damages, and the manner the question of raised by Stephenson is not provided.

Under Kentucky's appellate rules of procedure, issues sought to be raised on appeal must be set out in a Prehearing Statement. The trial court ruled that the Board of Trustees did not enjoy sovereign immunity and that Stephenson did not enjoy qualified immunity from personal liability for damages. Stephenson did not include in his Prehearing Statement (on the second appeal to the Court of Appeals) the issue of whether the trial court's judgment denying him qualified immunity was erroneous. The only issue included in that Prehearing Statement was whether the Board of Trustees and Stephenson enjoyed *sovereign* immunity. Thus, Stephenson did not preserve for appeal any claim of error bearing on his personal liability to Hayse for his constitutionally impermissible conduct.

Summary of the Argument:

1. Can a state's traditional common law sovereign immunity, which would otherwise completely bar U.S.C. §1983 suits or direct constitutional claims against the state in its own courts be waived or lost through procedural default during litigation?

This issue raises no federal question. The Opinion below turned wholly on state law grounds. State law did not operate to defeat Hayse's §1983 or direct constitutional claims.

Since the Cross-Petition, this Court held in *Howlett v. Rose*, 110 S.Ct. 2430 (decided June 11, 1990), that state law sovereign immunity is not a defense to §1983 actions in state court, if the state's courts can otherwise subject the §1983 defendant to damage liability. The Board of Trustees is subject to damage liability in Kentucky's courts under Kentucky's Civil Rights Act.

The two U.S. Supreme Court decisions and the two federal circuit court opinions relied on by the University (Cross-Pet. 10) as holding that sovereign immunity is a jurisdictional defense turned on 11th Amendment immunity.

2. Since Kentucky has not formally waived its traditional common law sovereign immunity from 42 U.S.C. §1983 or direct constitutional claims, did the Supreme Court of Kentucky err in ruling that prospective injunctive relief is authorized against the state itself?

This issue raises no federal question. The Opinion below turned wholly on state law grounds. The Kentucky Supreme Court held that the state constitutional provision which is the source of Kentucky's doctrine of sovereign immunity did not preclude a Kentucky court from granting prospective injunctive relief against the Board of Trustees, which would otherwise enjoy sovereign immunity.

The question of whether the Board of Trustees enjoys sovereign immunity does not include within it the question of whether the Board of Trustees is a "person" under §1983. If the contrary is true, the record below contains nothing upon which a determination can be made on whether the Board of Trustees is "an arm of the state."

The Board of Trustees has never contended (not even in its Cross-Petition) that it is not a "person" under §1983.

3. If a state official acts within the scope of his employment, can he be personally liable for monetary damages to a plaintiff who prevails in a 42 U.S.C. §1983 suit against him?

As not being a named or necessary Respondent on the Petition, Stephenson is precluded by the time requirements of Rule 13.4 from filing a Cross-Petition.

The law is settled that a state official acting within the scope of his employment, when sued individually can be held personally liable for monetary damages in a §1983 suit.

The Cross-Petition gives no reasons (See, Rule 10.1.) why this Court should review the pleadings and proceedings which concluded that Stephenson was sued in his individual capacity.

4. If 42 U.S.C. §1983 claims are defectively plead initially as direct constitutional claims, is the statute of limitations for 42 U.S.C. §1983 claims nevertheless tolled by the initial defective pleading?

This issue presents no federal question. The Board of Trustees and Stephenson admitted in their original Answer that Hayse received his official notice from the University of the rejection of his second tenure application on May 5, 1978. This action was commenced on March 27, 1979, and within the one-year statutory period applicable to §1983 claims in Kentucky.

Hayse's second tenure application was not an appeal of the review of his first tenure application.

Ratification of a terminal reappointment contract is not equivalent to disapproval of a tenure application. Neither of Hayse's tenure applications reached the Board of Trustees for action. The court below did not misinterpret *Delaware State College v. Ricks*, infra, when deciding when Hayse's cause of action accrued for the purpose of commencing the running of the statute of limitations.

5. In holding that the limitations period for 42 U.S.C. §1983 does not begin to run at the time of a university professor's terminal reappointment, did the Supreme Court of Kentucky misinterpret Delaware State College v. Ricks, 449 U.S. 250 (1980)?

This issue presents no federal question. This question is but a reframing of Question No. 4 for reargument.

Argument

1. **Can a state's traditional common law sovereign immunity, which would otherwise completely bar U.S.C. §1983 suits or direct constitutional claims against the state in its own courts be waived or lost through procedural default during litigation?**

This issue raises no federal question. A federal question would have been presented only if the Court below had ruled that the inter-play of Kentucky's common law doctrines of sovereign immunity and "law of the case" operated as a *defense* to Hayse's §1983 claims or direct constitutional claims. What the Kentucky Supreme Court held was that because of Kentucky's "law of the case" doctrine, the Board of Trustees could not assert state law sovereign immunity as a defense to Hayse's *damage* claims directly under the Constitution and under §1983.

With *Howlett v. Rose*, 110 S.Ct. 2430 (decided June 11, 1990), this Court held that state law sovereign immunity was not a defense available in a §1983 action brought in state court if the §1983 defendant was subject to suit in state court under other state causes of action. The University is subject to suit for damages and injunctive relief in Kentucky courts under KRS 344.450, by operation of KRS 344.010(1) and KRS 344.030(1) of Kentucky's Civil Rights Act. See, also, *Dunlap v. University of Kentucky Student Health Services Clinic*, Ky., 716 S.W.2d 219 (1986) (the University of Kentucky Medical Center, otherwise enjoying sovereign immunity, subject to damage claims in state court to the extent of liability insurance coverage.) The University is subject to an action for damages under the statute upon which this action was originally based.

Howlett, in rejecting the argument (made also by the University) that sovereign immunity operated as a defense to

§1983 actions because it was "jurisdictional," held that the force of the Supremacy Clause could not be evaded by mere mention of the word "jurisdiction."

None of the U.S. Supreme Court and U.S. Circuit Court of Appeals cases cited at page 10 of the Cross-Petition can properly be construed as holding that state common law sovereign immunity is jurisdictional. Those cases turned on 11th Amendment immunity.

Since this Court has held in *Felder v. Casey*, 487 U.S. 131 (1988) that state law defenses cannot operate to *defeat* a §1983 claim, and neither of Kentucky's common law doctrines of sovereign immunity or "law of the case" operated to defeat Hayse's §1983 claim for damages, no federal question is presented.

The University's first question presented for review proceeds on the false premise that Kentucky's common law sovereign immunity would bar §1983 suits or direct constitutional claims against it in state court. In light of *Howlett*, and because resolution of this issue below turned wholly on state common law principles, a writ with respect to this question should be denied.

2. **Since Kentucky has not formally waived its traditional common law sovereign immunity from 42 U.S.C. §1983 or direct constitutional claims, did the Supreme Court of Kentucky err in ruling that prospective injunctive relief is authorized against the state itself?**

This issue raises no federal question. When granting Hayse *limited* prospective injunctive relief against the Board of Trustees, the Kentucky Supreme Court held, citing decisions of other state courts, that Kentucky Constitution §231, the font of Kentucky's sovereign immunity doctrine, did not operate to defeat a claim for prospective injunctive relief against an entity

otherwise recognized as enjoying sovereign immunity. Although noting that the reason for the distinction made by other state courts in reaching that result stemmed from the decision in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the decision below turned on purely state law grounds in the form of a state's highest court interpreting a section of its state constitution. (Pet. 12a-13a.)

In light of *Howlett* and *Felder*, it is irrelevant whether or not Kentucky formally waived its traditional common law sovereign immunity from §1983 claims. On Hayse's first appeal, the Kentucky Court of Appeals assumed that sovereign immunity was no impediment to *any* of the relief sought by Hayse on his federal constitutional claims holding that Hayse was "entitled to relief" if he prevailed at a *Mt. Healthy* trial. (Pet. 55a.)

The question of whether the Board of Trustees enjoys the defense of common law sovereign immunity is not the same as the question of whether the Board of Trustees is a "person" under §1983. The former (sovereign immunity) is wholly dependent upon a state court's interpretation of the effect of that doctrine on claims brought in its courts. Whether an entity is a "person" under §1983, as evidenced by *Will v. Michigan Department of State Police*, 491 U.S. ___, 105 L.Ed.2d 45, 109 S.Ct. ___ (1989), is dependent upon the intent of Congress when it enacted §1983.

Because the first two questions presented for review are couched solely in terms of state common law sovereign immunity, the question of whether the Board of Trustees is a "person" under §1983 has not been presented for review. Should this Court be of a different view, i.e., that questions framed in terms of common law sovereign immunity in reality assert that the §1983 defendant is not a "person" under §1983, Hayse will show that the record below will not admit of review

of that question.

The Board of Trustees makes no mention of *Will*, which held that states and state officials sued officially are not "persons" subject to *damage* liability under §1983. Relying on *Ex Parte Young*, this Court in *Will*, at 105 L.Ed.2d 45, 58, fn 10, held that "(o)f course a State official in his or her official capacity, when sued for injunctive relief would be a person under §1983 because 'official-capacity actions for prospective injunctive relief are not treated as actions against the State.'" The Board of Trustees of the University of Kentucky, as having been sued in its official capacity for prospective injunctive relief of reinstatement, is thereby a "person" under §1983.

At no time since the commencement of this action in 1979 through the filing of its Cross-Petition has the Board of Trustees asserted that it was not a "person" within the meaning of §1983. There is nothing in the record by way of evidentiary hearing or otherwise which would show whether or not the Board of Trustees is "an arm of the state" so as to exclude it from "person" status under §1983. There is nothing in the record below upon which this Court could determine whether the Board of Trustees meets the criteria for Eleventh Amendment immunity, the standard by which *Will* measured whether the §1983 defendant is the "state," and thus not a "person" under §1983. See the analysis in *Mt. Healthy* in this regard at 429 U.S. 274, 280-81.

Quern v. Jordan, 440 U.S. 332, 337, 59 L.Ed.2d 358, 364, 99 S.Ct. 1139 (1979) pointed out that under *Ex Parte Young*, *supra*,

> . . . a federal court, consistent with the Eleventh Amendment, may enjoin the state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury.

Citing *Palmer v. Ohio*, 248 U.S. 32 (1918) and *Hopkins v. Clemson College*, 221 U.S. 636, 55 L.Ed. 890 (1911), the University states that this Court "has long recognized each state's right to exercise its traditional sovereign immunity against all causes of actions." The University was ill-advised to cite *Palmer*. *Palmer* was not brought under the U.S. Constitution, and held that the question of whether the state of Ohio could be sued for damages for flooding plaintiff's land was a question of local (state) law. Because no federal question was involved, this Court dismissed for want of jurisdiction.

The Board of Trustees incorrectly asserts that *Kashani v. Purdue University*, 813 F.2d 843 (7th Cir. 1983), *cert. denied*, 484 U.S. 846 (1987) and *Lee v. Western Reserve Psychiatric Rehabilitation Center*, 747 F.2d 1062 (6th Cir. 1984), conflict with the opinion below. *Kashani*, with the exception that it was decided on 11th Amendment principles rather than those of common law sovereign immunity, is in perfect harmony with the decision below. *Kashani* specifically held at 848:

> Although the Eleventh Amendment bars all claims against Purdue and the damage claims against its officials in their official capacities, it does not thwart the claims against the officials in their official capacities for the injunctive relief of reinstatement.

Lee held that a discharged probationary employee's claim for prospective injunctive relief in a §1983 action was not barred by the Eleventh Amendment. The trial court was affirmed on other grounds, however.

Hayse neither sought nor was he granted prospective injunctive relief against Stephenson. The Board of Trustees is the only governmental entity empowered to effect Hayse's reinstatement. The discussion of Stephenson in the context of

prospective injunctive relief at page 11, including footnote 5, is incomprehensible.

In a gross distortion of the truth, the University states that the parties "had agreed that the Board of Trustees has already reviewed and rejected Hayse's application for tenure." (Cross-Pet. 13.) Ratification of a terminal reappointment contract is not the equivalent of disapproval of a tenure application, and the University knows it. Neither of Hayse's tenure applications reached the Board of Trustees for action, as required by the Regulations.

Since the Opinion below held, wholly under state law, that Kentucky's doctrine of sovereign immunity does not bar prospective injunctive relief against an entity which otherwise enjoys sovereign immunity, no federal question has been presented, and the writ on this question should be denied.

3. **If a state official acts within the scope of his employment, can he be personally liable for monetary damages to a plaintiff who prevails in a 42 U.S.C. §1983 suit against him?**

This question asks whether Stephenson may be held personally liable for monetary damages. This Court is without jurisdiction to review this question.

Hayse's Petition named only the Board of Trustees of the University of Kentucky as a Respondent, to the exclusion of Stephenson. Because Stephenson has no interest in the outcome of the Petition's sole question, i.e., Hayse's entitlement to reinstatement in the form of prospective injunctive relief against the Board of Trustees, Stephenson was not named as a Respondent to the Petition. Stephenson served no notice that he *had* an interest in the outcome of the Petition and did not join in the Brief in Opposition to the Petition.

Because Cross-Petitioner Stephenson is not a Respondent in the Petition, and did not file a cross-petition within the time provided in paragraphs .1 and .2 of Rule 13, as provided in Rule 12.3, the Cross-Petition with respect to Stephenson was filed jurisdictionally out of time.

In any event, the issue is frivolous. It is settled that a state official can be personally liable for monetary damages to a plaintiff who prevails in a §1983 suit against the official. *Scheurer v. Rhodes*, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974).

Not only was Stephenson untimely in petitioning the Court concerning the individual damages judgment against him, he is seeking to relitigate in this Court the wholly non-federal question of whether he was sued in his official or individual capacity. As the court below pointed out:

> There has never been any doubt in this case until now that Dean Stephenson was sued individually, that there were two defendants, Dean Stephenson *and* the Board of Trustees. (Pet. 11a; Emphasis, the Court's.)

As the court below noted:

> The jury instructions, without objection, identified Stephenson as a separate defendant subject to an award of damages against him, personally. (Pet. 11a.) See, Appx. 1a-4a.

No reason whatsoever is given (there is none) why this Court should review the pleadings and the manner in which this case was litigated so as to decide what was obvious to the Court

below (and Stephenson, if he were candid) that Stephenson was sued in his individual capacity.[7]

4. If 42 U.S.C. §1983 claims are defectively plead initially as direct constitutional claims, is the statute of limitations for 42 U.S.C. §1983 claims nevertheless tolled by the initial defective pleading?

The University gives no guidance as to what it means by "defectively plead" §1983 claims. Resorting to guess-work, Hayse deciphers those words to suggest that Hayse's direct constitutional claims remanded for trial on the first appeal were "defective." At every stage of the proceedings, without objection (and with the concurrence of the University, in fact) Hayse's federal constitutional claims and his identical claims under §1983 were litigated as separate, independent claims. At the trial court, the University did not raise or otherwise preserve the issue of whether Hayse's federal constitutional claims and identical §1983 claims could be pursued simultaneously. Neither by its Cross-Appeal to the Court of Appeals (on the second appeal) nor by its motion for discretionary review, did the University present that issue for appellate review.

In any event, this issue presents no federal question. The decision that Hayse's §1983 claims and federal constitutional

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[7] A punitive damage instruction was given with respect to Stephenson *only* because the parties perceived that *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 69 L.Ed.2d 616, 101 S.Ct. 2748 (1981), which held that a municipality was immune from punitive damages under §1983, was probably applicable to the Board of Trustees.

claims were not time barred turned on a judicial admission. The Court below noted:

> The Board of Trustees and Stephenson admit that the official notice of the rejection of Hayse's second tenure application was not received until May 5, 1978. (Pet. 7a.)

The admission to which the Court below was referring was found in the initial Answer filed by the Board of Trustees and Stephenson. This action was commenced on March 27, 1979,[8] and thus within the one-year statute applicable to §1983 claims under the rule of *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985).

Putting words into the Opinion which are not there, the University falsely states "The Supreme Court of Kentucky reasoned that because Hayse might have been rescued from termination had the University failed to confirm its original denial of tenure, the statute of limitations did not begin to run until the University made that confirmation in May, 1978." (Cross-Pet. 16-17.) The University uses this carefully worded statement in a none-too-subtle attempt to lead this Court into the false impression that Hayse's second tenure application was but an appeal of his first tenure application. Hayse's second tenure application was just that, a *second* tenure application, and was identified as such by the Kentucky Supreme Court. (Pet. 7a.)

Limitations was never pled as a defense to Hayse's federal constitutional claims. Under Kentucky law, limitations is an affirmative defense which, if not pled, is waived. *Thompson v. Ward*, Ky., 409 S.W.2d 807 (1966); *Young v. Tackett*, Ky., 481

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[8] At page 4a of the Petition, at the beginning of the second full paragraph, the date is incorrectly shown as "March 27, 1978."

S.W.2d 661 (1972). Although the Court below so states (Pet. 6a) and the University states (Cross-Pet. 15) that the parties agree that Hayse's federal constitutional claims are subject to the same one year statute of limitations as are his §1983 claims, Hayse has never so agreed. Hayse has claimed throughout that his federal constitutional claims were not time barred because of KRS 413.120(6) with respect to "(a)n action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated" with respect to which there is a five-year limitation.

Kentucky Civil Rule 15.03, like the federal rule, has a "relation back" feature for amended pleadings. Evidencing a marked lack of awareness of the relation back feature of Kentucky Civil Rule 15.03, the University emphasizes the dates the Amended Complaints were filed as its basis for asserting that Hayse's claims are time barred. The argument is just plain wrong.

The rule of *Delaware State College v. Ricks*, 449 U.S. 250 (1980) is that for purposes of the running of limitations a cause of action accrues on the date the public employer communicates to the public employee its final decision bearing on the employee's employment relationship. In *Ricks* that date coincided with the date of the offer of a terminal reappointment contract. Here, however, the date that the University's final decision bearing on Hayse's employment relationship was communicated to Hayse occurred *during* the term of Hayse's terminal reappointment on May 5, 1978. Since Hayse's action was commenced on March 27, 1979, it was commenced within one year of the date his action accrued. Furthermore, since May 5, 1978 was *not* the last day of Hayse's employment, the Court below did not create a "last day of employment" rule for purposes of accrual of actions, as the Cross-Petition suggests.

This issue was decided in accordance with the rule of *Ricks* and was based on determinations of fact. A writ with respect to it should be denied.

5. **In holding that the limitations period for 42 U.S.C. §1983 does not begin to run at the time of a university professor's terminal reappointment, did the Supreme Court of Kentucky misinterpret *Delaware State College v. Ricks*, 449 U.S. 250 (1980)?**

This issue does not present a federal question. It appears to be nothing more than a reframing of Question Number 4. See Argument, above. A writ with respect to it should be denied.

Conclusion

WHEREFORE, Cross-Respondent, Dr. Joseph Murray Hayse, submits that the Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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